FOR PUBLICATION

ATTORNEYS FOR APPELLANT:

STEPHEN BOWER
Cohen & Thiros, P.C.
Merrillville, Indiana

STEPHEN KOMIE
Komie & Associates
Chicago, Illionois

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

STEPHEN TESMER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROGELIO MEDINA**,**	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0408-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SUPERIOR COURT OF LAKE COUNTY
The Honorable Salvador Vasquez, Presiding Judge
Cause No. 45G01-0301-FA-2

August 23, 2005

OPINION ON REHEARING – FOR PUBLICATION

MATHIAS, Judge

On June 2, 2005, this court issued Medina v. State, 828 N.E.2d 427 (Ind. Ct. App. 2005). On July 5, 2005, Medina filed a petition for rehearing, asserting that this court erroneously relied upon Neder v. United States, 527 U.S. 1 (1999). We grant Medina's petition solely to address Medina's claim, and otherwise affirm our original holding.

Medina claims that, in light of Blakely v. Washington, 542 U.S. 296 (2004), Neder's holding that the failure to submit an element to the jury is subject to federal harmless error may be short-lived. Pet. for Reh'g at 5-7. Medina also notes that a recent opinion from this court, Freeze v. State, 827 N.E.2d 600 (Ind. Ct. App. 2005), is inconsistent with our holding because Freeze notes that Neder's holding might be short-lived in light of Blakely.

We completely agree with Freeze's characterization of the future viability of Neder and were well aware of this concern when we issued our opinion.[1] However, our doubts as to Neder's future viability do not lessen the fact that Neder remains controlling, current precedent. More important however, is Medina's failure to render a specific objection to the instruction at issue. Justice Scalia's indication that a specific objection is required strongly suggests that the case at bar will not be the case to challenge Neder's viability. See Tr. p. 11; Neder, 527 U.S. at 39.

Medina also claims the failure to instruct the jury as to the mens rea of Class A felony child molesting was not harmless, because he could have been "rough housing" with A.L. and the jury's conclusion that he penetrated A.L.'s vagina could have been the result of an accident. Had Medina been convicted of the Class C felony variant of child

[1] In fact, this concern was the reason for footnote 3, found on page 431 of the opinion.

molesting, which does not require proof of penetration, his argument might have merit. See Ind. Code § 35-42-4-3(b) (2004).

Medina also claims this court denied him his right of assistance of appellate counsel and an opportunity to respond to this issue by raising this argument sua sponte. As this Petition for Rehearing demonstrates, Medina received and took advantage of his opportunity to respond to the contention that the instruction was harmless. Moreover, anytime an appellant makes a claim of error, that appellant should be prepared to assert that the error contributed to his verdict or had some other negative effect on his rights.[2]

Subject to this clarification, we affirm our initial holding.[3]

BAILEY, J., concurs.

SULLIVAN, J., concurs with opinion.

[2] Medina notes this court "must" waive an issue not addressed by the State. Pet. for Reh'g at 3 (citing State v. Friedel, 714 N.E.2d 1231, 1243 (Ind. Ct. App. 1999)). However, Friedel does not indicate a court "must" waive such an issue and *actually addressed the issue subject to waiver*. See Friedel, 714 N.E.2d at 1243.

[3] Medina also claims the trial court erred in refusing to allow him to present evidence of a "loving relationship" between him and A.L. Pet. for Reh'g at 7-9. This contention was rejected by our initial opinion.

IN THE
COURT OF APPEALS OF INDIANA

ROGELIO MEDINA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0408-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

SULLIVAN, Judge, concurring

The majority opinion upon rehearing acknowledges that the future viability of Neder v. United States, 527 U.S. 1 (1999) might be questioned in light of Blakely v.Washington, 542 U.S. 296 (2004). The majority holds, however, that "Neder remains controlling, current precedent." Slip op. 2.

In this regard it may be noted that in our basic opinion of June 2, 2005, we applied the doctrine of federal harmless error. In Neder the Supreme Court was reviewing a federal court conviction, and of course in that context the federal harmless error doctrine was clearly applicable. The case before us is a state court conviction.

In Chapman v. California, 386 U.S. 18 (1967), upon which Neder relies, the conviction being reviewed was a state court conviction. However, in that case federal

constitutional issues were clearly involved, thus triggering federal harmless error considerations. To the same effect is Pope v. Illinois, 481 U.S. 497 (1987), also relied upon in Neder.

The issue before us involves Indiana common law as to the sufficiency of instructions. One might therefore question application of federal harmless error. Be that as it may, that question is answered by Sullivan v. Louisiana, 508 U.S. 275 (1993).

In Sullivan, a state court conviction involved an instructional error concerning reasonable doubt. The federal harmless error standard was applied, however, because the instructional error violated the defendant's Sixth Amendment right to trial by jury. The instructional defect in the case before us was the failure to instruct as to the crucial element of mens rea. Accordingly, the federal constitutional right to trial by jury, as in Sullivan, was implicated.

Although I agree that we correctly applied the doctrine of federal harmless error, I deem the controlling precedent to be Sullivan v. Louisiana rather than Neder v. United States.